

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 IN SEATTLE

4 ROBERT KELLY,)
5)
6 Plaintiff,) No. C 04-2338RSM
7)
8 v.)
9)
10 THE CORPORATION OF THE PRESIDENT)
11 OF THE CHURCH OF JESUS CHRIST)
12 OF LATTER-DAY SAINTS)
13)
14 Defendant.)
15)

16 CLOSING ARGUMENTS

17 BEFORE THE HONORABLE RICARDO S. MARTINEZ

18 October 10, 2006

19 APPEARANCES:

20 For the Plaintiff: Michael T. Pfau
21 Tim Kosnoff
22 and
23 Michael Rosenberger
24 Attorneys at Law

25 For the Defendant: Charles Gordon
and
Jeffrey Tilden
Attorneys at Law

1 MR. PFAU: Thank you, your Honor. Counsel.

2 Ladies and gentlemen.

3 Where were you when Jack Kennedy was shot and
4 assassinated? It is a phrase that has almost become a
5 cliché in our society. For those of us or you that were not
6 born in 1963 or were too young to remember that date, I
7 think 9/11 serves the same analogy. Why is that important
8 or what relevance does it have to this case? One of the
9 fundamental issues in this case is when was Bobby Kelly
10 sexually abused by Jack Loholt.

11 The strongest testimony is from Dorothy Kelly.
12 And when asked, both on direct examination and
13 cross-examination, why it is that she, without question,
14 believes that it was the summer of 1972, amongst all the
15 other things she could remember, she said because it was
16 traumatic.

17 She said two things, for a variety of reason I
18 am going to go into. Primarily she said, you remember
19 things surrounding trauma. She said, I remember it was in
20 the summer of '72, and importantly I remember after talking
21 with Dr. Allenbach that he was gone in a matter of months.
22 How many months she wasn't sure, but of these issues she was
23 sure.

24 Ladies and gentlemen, I submit to you that all
25 the competent and most relevant testimony in this case

1 established conclusively that Robert Kelly was sexually
2 abused in the summer of 1972.

3 If you look at the exhibit in front of you, her
4 belief or her reflection that it was '72 is also based on
5 facts.

6 Very importantly, she said that she recalls her
7 daughter -- she recalls it was the summer of '72s because
8 her daughter was divorced in 1971 and moved back to
9 Washington from California. Another, I won't call it a
10 tragedy, but something that would help someone remember
11 when. And she remembered it was in the spring of that year
12 that her daughter who had been staying with her after she
13 left her husband, after she moved back from California, left
14 to buy her own home which she shared with her daughter --
15 her daughter's daughter in Black Diamond. And she recalls
16 she wasn't in the home, the Kelly family home in Kent,
17 because after Bobby -- after Loholt masturbated in front of
18 the boys in the field she was concerned. And a number of
19 the relatives came back for a family meeting. And she was
20 asked about that specifically by both lawyers for both
21 sides. And she said, I am certain it was after she moved
22 out because she came back to the home, wasn't living there.

23 That is one piece of evidence in a string of
24 evidence, ladies and gentlemen. She recalls Bobby Kelly
25 developing serious behavioral problems in the fifth grade.

1 Again, a very important fact.

2 Bobby Kelly doesn't remember exactly when he
3 developed these problems but his mom does. And it is not
4 pie in the sky. There was an event that followed the
5 behavioral problems. And he was transferred from public to
6 private school. A major event. And he was transferred from
7 public to private school not because of his grades. Counsel
8 pointed out, well, geez, there is not that much difference
9 in his grades, he had Ds, Cs and Bs throughout. That didn't
10 change. It was his behavioral problems.

11 And remember the testimony, ladies and
12 gentlemen. You heard snippets of what those behavioral
13 problems were that caused the concern that led to a transfer
14 to a private school, Saint James Catholic School, which they
15 thought would be more disciplined for their son.

16 And these weren't little things, ladies and
17 gentlemen. There was testimony that Robert Kelly in the
18 fifth grade, which would have been after the summer of 1972,
19 plugged up the toilets, turned on the water and flooded the
20 school. There was testimony that he stood up and he punched
21 the tiles and he broke the tiles. There was testimony that
22 he became more violent and he was involved in fights.

23 As an aside -- I am deviating from my outline
24 here but I don't want to forget about this. It has to do
25 with Dr. Wise's testimony that all personalities are formed

1 within the first three to five years, and therefore it is
2 unlikely that the child would be affected by the rape.

3 Jimmy Allenbach was also transferred to Saint
4 James because of behavioral problems. He is one year --
5 they were one year apart. What is the likelihood that both
6 these kids developed behavioral problems at or around the
7 fifth grade and are transferred to Saint James? Keep that
8 in mind, ladies and gentlemen. Both kids were abused
9 together, were transferred because of behavioral problems.

10 That is not the only testimony. The testimony
11 in the depositions, and was repeated at trial, from Dorothy
12 Kelly, he was approximately nine years old when the abuse
13 occurred. Looking back over the course of 30 years, mom
14 testified that he was approximately nine years old.

15 Robert Kelly testified in deposition, and he
16 reported that he was nine to twelve years old. Same time
17 period.

18 Interestingly, nine years old places Robert
19 Kelly, in part, in the summer of 1972. I don't think it is
20 that important, because I think when you are talking about
21 approximate ages, nine, ten, etcetera -- those were
22 approximate ages. But the facts that allow witnesses to
23 place people and events in a time frame are very important.
24 But he was nine years old in the summer of 1972.

25 Why is it the summer -- or summer or fall --

1 All of the testimony establishes that it was warm whether,
2 ladies and gentlemen. Remember, Loholt lured the children
3 into the apartment with root beer and firecrackers.

4 Summertime activities, summertime things.

5 You will recall that when Dorothy Kelly and her
6 husband went to speak with Dr. Allenbach he was lying in bed
7 with a broken leg. He had broken his leg playing baseball,
8 a summer or fall activity in this state.

9 Dorothy Kelly testified that Loholt moved out
10 within months of her complaining to Dr. Allenbach about the
11 abuse. This makes sense, ladies and gentlemen. He moved
12 out in January of 1973. If the complaint took place in the
13 summer or the fall, Bobby Kelly is approximately nine years
14 old, nine or ten, he is between the fourth and fifth grade,
15 it is in the summer, and Loholt is asked to leave and does
16 move within months.

17 Now the term "months" has been used to describe
18 the duration of the abuse. No one here -- I think
19 Mr. Gordon in opening said it was two months. But there is
20 no testimony it was two months. I think Rochelle
21 testified -- Rochelle testified that Bobby told her it was
22 six to eight months. There has been testimony that it might
23 have been four months. That is reasonable. You are talking
24 about looking back over time and trying to figure out when
25 something happened.

1 The medical records indicate that Robert Kelly
2 was nine years old.

3 So what's left of the argument that it was
4 before the summer of 1972, despite all that proof from the
5 witnesses? Very very little.

6 At one point Robert Kelly told a counselor that
7 it was age six. He went in, he wasn't dealing with these
8 issues, and he told him it was age six. It is a single
9 reference contradicted by a second reference in counseling.
10 And it is not even possible because Loholt wasn't living
11 there at age six.

12 Ladies and gentlemen, all of the credible
13 evidence suggests it is 1972; it is the summer of 1972.

14 You are instructed on the burden of proof. The
15 burden is on behalf of the plaintiff to prove these facts to
16 you, to prove the case to you.

17 Remember this isn't a criminal case. It is not
18 beyond a reasonable doubt. Our burden of proof doesn't
19 suggest it has to be 1972 and there could be no possible
20 reasonable doubt. All we have to prove is that it is more
21 probably true than not that it happened in the summer of
22 1972. I think that is a critical fact.

23 I think the other critical fact or cluster or
24 constellation of facts in this case has to do with Bishop
25 Borland's testimony, ladies and gentlemen.

1 Before we talk about Bishop Borland's testimony,
2 which is fascinating when you look at the facts that
3 surround it, I want you to look at a clip of then Richard
4 Pettit, eventually Bishop Pettit's testimony about --

5 MR. TILDEN: Your Honor, we would object to a
6 replay of the evidence. The evidence has already in.

7 (At this time the jury entered the courtroom.)

8 MR. PFAU: No different, your Honor, than showing
9 a page of the deposition.

10 MR. TILDEN: I agree with that.

11 THE COURT: I agree with that as well. The
12 objection will be sustained.

13 MR. PFAU: Let me summarize what he said. And I
14 hope you recall. Do you remember, first of all, Bishop
15 Borland said, and his testimony changed as he went on, he
16 said the dad was distraught, Pettit was distraught when he
17 came to him. Pettit testified -- Richard Pettit's
18 testimony was, I was shocked at what my son told me. I felt
19 sorry for my son because of what he told me. I went to the
20 Bishop because I wanted concrete action. I wanted the
21 bishop to do something about Loholt.

22 It is against that backdrop, ladies and
23 gentlemen, that Bishop Borland comes to you and he
24 testifies -- Why don't we turn to Exhibit 3 -- or
25 Exhibit 2? Recall this testimony.

1 Before we do that, step back. Remember, we also
2 heard from the son, Scott Pettit. Scott Pettit came. And
3 what did Scott Pettit testify about what happened? Scott
4 Pettit testified that he slept over at the Allenbachs'. He
5 was a friend. He was older, 15, 16. He slept over. He was
6 a friend of Brent Allenbach. During the night Loholt came
7 into his sleeping bag and repeatedly tried to grab at his
8 penis and his testicles. He fought him off and he rolled
9 over, and Loholt was back again. He fought him off and
10 rolled over, and Loholt was back again. It went on all
11 night. He was sexually assaulted, ladies and gentlemen.

12 He went to his dad. He testified he went to his
13 dad. The testimony was that he was crying and he was upset.

14 Enter Bishop Borland. And recall there were
15 actually very few surprises. We take depositions. We know
16 what witnesses are going to say. This was a surprise from
17 the perspective of our case. Not an unpleasant surprise
18 because the testimony, ladies and gentlemen, is so
19 unbelievable as to be preposterous.

20 What he said is that he had a son and a father
21 come to him, and he said it was a special meeting. And I
22 asked a lot of questions. And maybe it didn't seem like
23 there was a rhyme or reason to them. But there was. I
24 asked Bishop Borland whether it was a special meeting or
25 just something in the congregation. Did you catch him at

1 the congregation to talk to him? No. He said it was a
2 special meeting set up because dad, Richard Pettit, wanted
3 to talk to him. And then he said -- I asked the question,
4 what did he talk to you about. Well, there was some
5 inadvertent touching.

6 And then, ladies and gentlemen, the target
7 begins to move. What do you mean by inadvertent touching?
8 Of a sexual nature? No, no, no, of course not, just horsing
9 around like we used to do.

10 Ladies and gentlemen, have you ever seen a child
11 spin a tale? It starts with an iota of truth and it
12 changes. And it changes subtly with each question. I
13 submit that is what was happening.

14 Okay. It was inadvertent touching. What does
15 that mean? Well, I'm not exactly sure what that means.
16 Well what did he say. He said he had lost confidence in his
17 scout master.

18 So one student loses confidence in a scout
19 master because of some horsing around and he is removed? He
20 was removed as the only assistant scout master in this
21 troop. And this becomes more incredible with each question
22 that is asked.

23 He was removed because there was some
24 inadvertent touching? And he said, yeah, he was worried, he
25 had lost confidence, was worried about getting his Eagle

1 Scout. Ladies and gentlemen, that is unbelievable
2 testimony.

3 MR. TILDEN: Your Honor, that is a comment on
4 credibility and we would object.

5 THE COURT: The objection is overruled. This is
6 argument.

7 MR. PFAU: Next, well, did you tell Ken Keller,
8 the scout master? And remember the questions I asked of
9 Bishop Borland. I said, Bishop Borland, were you friends
10 with Ken Keller? Yes, I was. I was personal friends with
11 Ken Keller. Bishop Borland, what is the responsibility of
12 the bishop vis-a-vis scouting? The bishop oversees
13 scouting.

14 So he has now testified, that although dad was
15 distraught, although the child was there, although the child
16 was crying, although the child has testified that he was
17 sexually assaulted, that wasn't mentioned at this meeting
18 that was set up specially; and that he released the scout
19 master because one scout in an entire troop had lost
20 confidence in him because he was horsing around, and then I
21 never told the scout master.

22 Imagine that, ladies and gentlemen. Imagine 20,
23 30, 40 kids. You have a scout master, you have an assistant
24 scout master, and one day the scout master doesn't show up?
25 And no one has any questions?

1 But remember Ken Keller's testimony. You have
2 to weave these things together. What did he say? He said,
3 no one talked to me about it, and it was none of my
4 business.

5 Think about that, ladies and gentlemen. If
6 there is a big big issue it may not be part of your
7 business. It may be confidential. And what else did he
8 say? I didn't -- He connected the not talking to the
9 bishop. He has lost his assistant scout master. What were
10 they doing on hikes, at merit badges, at meetings. It begs
11 the question.

12 And then he said, yeah, Jack Loholt stopped
13 coming to church for a while. I didn't see him during that
14 time period. And he was going through some sort of church
15 discipline, some sort of disciplinary action.

16 Ladies and gentlemen, one plus one equals two.
17 Bishop Borland removed Scott -- removed Loholt from scouting
18 because he had sexually assaulted a child. And there was a
19 report of that sexual assault.

20 And what you are seeing here, ladies and
21 gentlemen, is none other than full blown clergy cover up
22 years after it happened. All the facts point to it.

23 Vicki, can you turn to Exhibit 4? There is
24 more, ladies and gentlemen. Bishop Borland testified that
25 he removed Loholt within a week or so of this complaint,

1 immediately. He gets a complaint of inadvertent touching or
2 horsing around that doesn't have anything to do with
3 sexuality, but I remove him. Rather draconian actions. But
4 suppose that was true. I think they didn't think we would
5 look and check the details.

6 Look at the entry on February 6th -- I will
7 call out the entry for February 6th, 1972. Jack Loholt is
8 released as the scout master. Assume we accept that he was
9 released as scout master because one scout lost confidence
10 in him for horsing around. The same day he was released as
11 the decon's quorum advisor. We spent a lot of time on
12 definitions, because definitions are important. The decon's
13 quorum advisor was the youth pastor to the 12 to 14 year
14 olds. Scott Pettit is 15.

15 If he is truly being removed from scouting, if
16 you can believe that, because of one scout losing confidence
17 in him because he was horsing around, why is he being
18 removed as the Deacon's Quorum advisor? In essence, the
19 youth pastor to the 12 to 14 year olds.

20 Ladies and gentlemen, he is being removed from
21 these positions because he is a danger to children. They
22 knew it and they were trying to do what they could to take
23 band-aid or immediate action.

24 And then what does he do later that month? If
25 you would look at 2/23. He is reinstated on the scout

1 committee.

2 Do you remember the questions, ladies and
3 gentlemen, about the scout committee? Bishop Borland went
4 to great lengths to talk about the scout committee. It is
5 not hands on. It doesn't have anything to do with kids. It
6 is distant. They don't go on hikes, etcetera, etcetera,
7 etcetera.

8 What they did in the span of a week or so of
9 receiving this complaint was remove him from all his
10 callings dealing with children and put him in a position
11 where he was still active but not dealing with children.
12 Why? Because he is a danger to children.

13 Ladies and gentlemen, why would Bishop Borland
14 come in here? First of all, the circumstances under -- I
15 don't know if this was clear or not. In the deposition they
16 took the position that that communication was confidential.
17 You can't ask about that conversation. Lo and behold by the
18 time we get to trial they waive the confidentiality. Waive
19 is a fancy legal term for it is no longer confidence
20 anymore.

21 If this was so innocuous, if this was such a
22 small event, and it was simply removing a scout master, why
23 was it confidential? Why did you waive it? Why did he tell
24 this story when he came into court?

25 For two reasons, ladies and gentlemen. One

1 primarily, he is a mandatory reporter under the law. In
2 1971, as clergy, Bishop Borland had a mandatory duty to
3 report. Not may but shall. If he suspected child abuse he
4 had a mandatory duty to call the police or call CPS. There
5 is no getting around it in this case.

6 So he tells you, oh, it must have been --
7 despite all the facts that we just set forth, it was
8 something else, it was inadvertent touching, but we removed
9 him from all youth activities, etcetera, etcetera. Ladies
10 and gentlemen, it doesn't even pass the smell test.

11 The question also becomes of Bishop Borland --
12 Well, let me change gears here. Suppose, ladies and
13 gentlemen, you are not as cynical as I am. Suppose you
14 accept Bishop Borland's testimony at face value. And that
15 is okay. It is hard, for example, to believe that police
16 officers beat people in prison. It is hard to believe that
17 doctors commit medical malpractice. There is a reason it is
18 hard to believe that. Because in society we have to trust
19 these people to do what's right. You tend to trust clergy.

20 Let's assume, for argument sake, that Mr. Pfau
21 is a cynic, I'm not, maybe I believe this story. Here is
22 the beauty of this from our perspective, ladies and
23 gentlemen. If Bishop Borland is testifying about what
24 really happened he was grossly negligent in how he reacted
25 to what were serious, serious red flags. A dad who was

1 distraught, a child is talking about being touched in some
2 fashion. This is in a light most favorable to Bishop
3 Borland. No follow up investigation. No further
4 questioning. Nothing.

5 What could Bishop Borland have done? Why don't
6 we turn to Tab 5? There a lot of things he could have done.
7 And there are a lot of things he should have done. He
8 should have called the police. He should have called CPS.
9 He could have called his stake president.

10 Remember his testimony about that? I could have
11 got on the phone to call my superior. I am trained to call
12 my superior. He could have alerted the Boy Scout Council.
13 He could talked to Ken Keller about the reasons he was
14 removing Loholt. He could have alerted the congregation.
15 He could have alerted the parents. He could have alerted
16 Dr. Allenbach. In the winter of 1971 and the early months
17 of 1972 he could have conducted a thorough investigation.

18 Part of plaintiff's theory of the case is that
19 he failed to warn and he failed to investigate. He failed
20 to report per his requirements, but he failed to
21 investigate. There was no investigation.

22 He could have sent Loholt for sexual deviancy
23 treatment. He could have, importantly, identified other
24 victims, ladies and gentlemen. He could have asked Scott
25 Pettit some questions, who was with you. Brent Allenbach

1 and Terry Clark. That takes him right to 152nd Street.

2 And he would have realized Loholt, if he didn't
3 know it already, was living with a Mormon family with a lot
4 of kids that was in rural Kent right next to a house owned
5 by a Catholic family with a lot of kids.

6 All of these things would have resulted in Jack
7 Loholt either being sent away for treatment, removed from
8 children, removed from the congregation, removed from the
9 Allenbach's house, monitored, investigated, reprimanded, all
10 of it, ladies and gentlemen.

11 Remember the testimony about, if I would have
12 known I would have taken a brick hammer to Loholt. What he
13 was saying to you is, I could have done something. It was
14 in my power. It was my power as bishop to effectuate what I
15 needed to do to protect kids, including Robert Kelly.

16 This brings us to the plaintiff's claims. And
17 they are threefold, ladies and gentlemen. You are going to
18 get instructions. And in these instructions it will talk
19 about the plaintiff's case, the defenses. But there are
20 three theories, three claims, and three ways in which the
21 church was negligent.

22 First and foremost, in 1971 clergy were
23 mandatory reporters. They had a duty to go to the police.
24 They had a duty to go to CPS. They had a duty to get the
25 ball rolling.

1 Now, interesting, despite this claim of
2 confidentiality, Bishop Borland went to Loholt. Remember
3 the testimony about confidentiality is not absolute. He
4 went to Loholt. According to Ken Keller Loholt was involved
5 in some church discipline. He could have gone to the
6 police.

7 Had he gone to the police an investigation would
8 have ensued, they would have gotten involved, they would
9 have done what is proper, interview the family members,
10 interview Scott Pettit.

11 I assessed Scott Pettit's credibility. He was
12 very credible. He would have told the police what happened
13 to him. And it was not inadvertent touching. There was
14 nothing about his testimony to suggest it was horsing
15 around. That is theory number one.

16 If you find for plaintiff on theory number one,
17 you have found the church negligent, and you will be
18 instructed to award the plaintiff damages.

19 Theory number two, failure to investigate,
20 failure to warn. These are the things that the bishop could
21 have done because of his power within the ward, because of
22 his responsibilities and because of his duties. The laundry
23 list I just went through. Had he done those things, ladies
24 and gentlemen, change would have been effected, Robert Kelly
25 would not have been sexually abused.

1 The final theory of the case, which is
2 interesting, is that Herman Allenbach was an agent of the
3 church. And you will be instructed on that. And I will
4 talk more about that later. But Herman Allenbach -- It is
5 interesting. 30 years later the church very much wants to
6 distance themselves from Herman Allenbach. The facts speak
7 for themselves. Herman Allenbach was a high priest. Herman
8 Altenbach, more importantly, was the priest quorum advisory.
9 Not for a couple of years. There are admitted facts he was
10 the priest quorum advisor from approximately 1969 to 1974.
11 During the entire period giving rise to these facts he was
12 the youth pastor.

13 Counsel suggests that he was a Sunday school
14 teacher. It doesn't matter under an agency analysis. It
15 was more than that. The testimony has been from every
16 Mormon witness that Boy Scouts, the Priest and Deacon's
17 Quorum, the meetings on Sunday, and the Young Men's Mutual
18 Association are interwoven. Ken Keller talked about that.

19 Herman Allenbach was the person at this ward in
20 charge of youth between the ages of 14 and 16 during the
21 entire relevant period. He was their agent.

22 Loholt was the youth pastor involved with
23 children between the ages of 12 to 14. Bishop Borland over
24 saw them both, and could do what he needed to do.

25 When Herman Allenbach learned twice, one when

1 his son testified, and you heard Jimmy Allenbach's
2 testimony, I told my dad about Loholt, and my sister, when I
3 was in the bathtub. It is a red flag, Dr. Allenbach. It is
4 a red flag that something is wrong with Loholt.

5 Fast forward to the summer of 1972. A neighbor
6 comes and says Loholt is masturbating in front of the kids.
7 It is a red flag, Dr. Allenbach. And Dr. Allenbach,
8 although I anticipate the defense is going to suggest this,
9 can't take his agency hat on and off. For this reason,
10 whether or not the abuse or the events giving rise to notice
11 take place on church property, he learned about them.

12 And when he goes back as the agent of the
13 church, and as the youth pastor, he knows that his fellow
14 youth pastor is a danger to children. He acted too slowly.
15 He didn't remove Loholt from his premise until the late
16 winter of 1972 or January of 1973. And that liability is
17 imputed onto the church. They controlled him, ladies and
18 gentlemen.

19 Those theories of the case, you don't have to
20 find all three, one, two or three add up to a verdict in the
21 plaintiff's favor. The evidence is overwhelming that Bishop
22 Borland and Dr. Allenbach were negligent. It is
23 overwhelming based on the story that was concocted here in
24 court, and what he didn't do and could have done, even if
25 you accept his facts.

1 I want to turn your attention now -- I want to
2 move from the liability case to the damage case. And what I
3 mean by that is -- Why don't we turn to Tab 7, Vicki? I
4 want to talk about Robert Kelly. You have seen in this
5 trial, and we didn't attempt to shield it in any way, shape
6 or form, Robert Kelly, the good, the bad and the ugly.
7 There is good, there is bad and there is ugly. I am going
8 to go into this. But he is the plaintiff, and the evidence
9 that he is damaged, and profoundly damaged, is
10 uncontroverted.

11 Dr. Wise and Dr. Conte, I am going to talk about
12 their testimony and I am going to compare the two of them
13 momentarily. They may disagree on what caused Robert's
14 damages but they agree completely on what his damages are.

15 If you take a look at the slide in front of you,
16 it summarizes some of Dr. Conte, Dr. Wise and what I will
17 call the lay fact witnesses, the girlfriends' and the
18 ex-wife's testimony.

19 I don't think anything sums up Robert Kelly
20 better than Dr. Conte's testimony that this is a stunted
21 adolescent. He acts like an adolescent. He does things
22 like an adolescent. He makes decisions like an adolescent.
23 And it is also borne out by the testing. Emotionally he is
24 a 12 year old. With regard to understanding his damages, he
25 is like a 12 year old.

1 Ladies and gentlemen, he is a 44 year old man
2 living at his mother's house. He has always lived at his
3 mother's house, but for a short period of time when he was
4 married.

5 Is that the be all and end all? No. Dr. Wise,
6 what do you think of that? I think it is pretty odd. Did
7 you follow up whether it was clinically significant? No, I
8 didn't ask that question. I didn't have enough time. I
9 only had an hour or two.

10 What does he do when he is engaged in conflict?
11 He goes back home, ladies and gentlemen.

12 Let's talk about some of the other damages that
13 is borne out. Dr. Conte says he is hiding out. He has
14 anger management problems. It is uncontroverted.

15 Jovine Umali described him as a Dr. Jekyll and
16 Mr. Hide. She says he is a nice guy, I liked him. And just
17 like that his temper explodes and he is unreasonable and he
18 is irrational.

19 Rachelle Cope talked about the same thing. She
20 talked about the uncontrollable anger. He was in anger
21 management therapy. You have seen some of the records. He
22 was evaluated because of his anger in a bitter, bitter
23 custody battle over the right to see his son.

24 That segues into another profound area of
25 damage. Robert Kelly can't sustain a meaningful

1 relationship. Lots of people have relationships broken off.
2 Not everyone marries everyone that they date. But he has a
3 history. Dr. Wise testified to it, Dr. Conte testified to
4 it, the ex-girlfriends and the ex-spouse testified to it, of
5 not being able to exist in a relationship. He gets angry,
6 he gets jealous, there are intimacy issues.

7 What are the intimacy issues? You heard from
8 Rachelle Cope. She was the blond haired woman. You heard
9 from Ms. Umali. And they phrased it differently, but they
10 were talking about the same thing, ladies and gentlemen.
11 Physically he can't be intimate. Emotionally he pushes
12 away. Rachelle Cope talked about physically not being
13 intimate. Ms. Umali was a little more up front. She said
14 during the relationship he couldn't achieve an erection.

15 Let's think about that. That was a relationship
16 in the early to mid '90s, ten years ago. Robert was
17 healthy. He was in his thirties. He was a ski instructor.
18 He was a tennis coach. There is no history of any organic
19 problems. He was involved in what appeared to be a
20 committed -- with a committed and beautiful woman. He
21 couldn't achieve an erection.

22 I will talk about some of the defenses. But one
23 of the defenses I think is, well, geez, this guy is damaged
24 because his dad yelled at him, spanked him, and he was hit
25 by a golf club once. Does anybody really think his

1 inability to have a sexual relationship is based on his dad
2 yelling at him on occasion and spanking him? The cause and
3 the effect is obvious, ladies and gentlemen.

4 There are work failures. Dr. Wise talked with
5 the work failures.

6 There are successes. Robert Kelly is smart. He
7 gets good grades. His resume looks wonderful. Remember
8 Ms. Umali? I thought he was the total package. He was good
9 looking. He came from a good family. We liked the same
10 things. We had the same interests. But when you peel away
11 the surface there is a damaged individual.

12 The same holds true for work. Dr. Wise talked
13 about the work, talked about the problems with the work.
14 And it happens when he is faced with interpersonal
15 relationships. He doesn't get along with bosses. He
16 doesn't get along with teachers. He has problems with the
17 students.

18 He suffers from depression and anxiety.
19 Dr. Wise talked about chronic low grade depression. He
20 talked about anxiety. He has been hospitalized, according
21 to Dr. Wise, who reviewed the records, for anxiety attacks.
22 He has been on medication for anxiety.

23 Now, the doctors that support this, they are not
24 talking in terms of formal diagnosis. Dr. Conte even said,
25 diagnosis and symptoms are not the best way to figure out

1 what is wrong with this gentleman.

2 But think about that, ladies and gentlemen.
3 Think about what we have talked about. Relationships, work,
4 family, hiding out, inability to sustain a job or
5 relationship. This is the fabric which makes a happy and
6 contented life. These are the things we rely on for
7 support. These are the things we rely on for self-esteem.
8 Without these things we can't move forward in a positive
9 way.

10 Does that mean, ladies and gentlemen, that
11 everything about Robert Kelly is bad? There is a danger in
12 that. There is a danger in opening up your lives, for
13 jurors seeing bad things, seeing unpleasant things, seeing
14 things that maybe you are not happy about.

15 There is also -- Why don't we turn to 11? This
16 is one of Robert's resumes. It details some of the things
17 he has done over the past five years. Quinalt Native
18 American Tribe, historical research and artifact
19 preservation. Political consultant campaign manager for the
20 Auburn Citizens for Schools campaign in the school district.
21 Metropolitan Development Council, program director.
22 Administrator of the Enhanced Mentoring Program, a program
23 designed for disadvantaged, at risk Native American
24 students. United Way of King County, Seattle, Washington,
25 1999 to 2000. Professional Development Positional

1 Responsibilities. Appointed by the Metropolitan King County
2 Council as a committee member to the Regional Governance
3 Council to analyze, review and decide the incorporation of a
4 municipality. Central Del Le Raza, mentoring and tutoring
5 at risk minority children. Central Area Youth Association,
6 mentoring and tutoring at risk minority children.
7 Legislative analysis, King County Council, initiated
8 professional internship.

9 I give you this, ladies and gentlemen, because
10 the human psyche, the human spirit, they are complex.
11 Unlike Dr. Wise, who testified about it being rocket
12 science, it is not.

13 There are good things about Robert. Rachel
14 talked about the good things. Jovine talked about the good
15 things. You heard from Julie Ellis. She is obviously a
16 very very angry woman. She hates Robert. Consider that
17 when you consider her testimony.

18 But the themes are all the same. This is
19 somebody that tries hard. This is somebody that looks good
20 on the surface, but this is someone who is profoundly,
21 profoundly damaged.

22 I want to talk about Dr. Wise and Dr. Conte.
23 Those are the experts. Who is Dr. Conte? Dr. Conte opines
24 on a more probably than not basis that Robert Kelly has been
25 damaged and has been damaged significantly because of the

1 childhood sexual abuse he endured. He has testified that
2 that is based on his observations, his testing and the
3 literature.

4 Dr. Conte, we are fortunate in this state to
5 have one of the foremost experts and researchers in the
6 United States at the University of Washington. His CV or
7 his resume, to the extent it is of interest to you, will be
8 provided. It has been made an exhibit. Look at it. Look
9 at the research. Look at the decades of work he has done in
10 this field. Consider his testimony. Consider his grasp of
11 the issues. Consider his expertise.

12 And he said, without question, the damages that
13 Robert suffered are due in part to the childhood sexual
14 abuse he suffered.

15 Contrast Dr. Wise. I like Dr. Wise. I have
16 deposed him. He is a nice guy. He is an expert. Is he an
17 expert in traumatic brain injury cases, and he is an expert
18 in involuntary commitments. He is not an expert in child
19 sexual abuse.

20 Recall the first question he had. Mr. Tilden
21 asked him, how many times was Robert abused. And he was
22 going like this. He couldn't answer it. He testifies three
23 to four times a week. He didn't even know that fundamental
24 fact.

25 And I asked him questions about his testimony.

1 And you remember he kept talking about the literature, the
2 literature, the literature. Dr. Wise, what literature?
3 Tell us. Right here. Right here. He fumbled around and he
4 pulled it out. I knew what he was doing. Dr. Wise, what
5 year is that study? 1991. It was 15 years old. I said,
6 Dr. Wise -- I questioned him about the deposition. He
7 admitted that when prior to having to prepare for trial,
8 when he pulled out one study, I asked him what studies, what
9 literature, what research do you base your opinion on,
10 Doctor? And he said, I can't think of any. Give me an
11 author, Doctor. I can't think of any. I am drawing a
12 blank. Give me a year, Doctor. I can't think of any. He
13 admitted that what he does -- he occasionally testifies in a
14 case involving child sexual abuse.

15 By contrast, Dr. Conte has evaluated 5000
16 victims of child sexual abuse.

17 He gets on line and researches some literature.
18 It is important because you have to consider his testimony
19 substantively.

20 What did he say? He basically said that he
21 doesn't think the abuse had any effect. And he made a
22 statement that I found incredible. He said that victims of
23 rape, they get over it or the symptoms dissipate in six
24 months to a year. That is amazing testimony. It is
25 absolutely unsupported. That people get over trauma -- He

1 went into testimony about the brain secreting certain
2 chemicals. How does that explain combat trauma? How does
3 that explain depression following family loss that goes on
4 for years? How does that explain rape victims that are
5 scared to go outside for a lifetime? It doesn't. He is not
6 competent in this field. His testimony should be given very
7 very very little credibility.

8 He said that the human personality is formed
9 between the ages of three to five. And therefore that is a
10 reason -- or he implied that is a reason that Robert Kelly
11 was not affected by the multiple rapes he endured in the
12 summer of 1972. Ladies and gentlemen, that is incredible
13 testimony.

14 What he was talking about is something I think
15 we all know. Human beings are wired differently. Some
16 human beings are more resilient than others, more resilient
17 to stress, but it is not a cause and effect analysis.

18 However, Dr. Wise had to agree with me on a
19 number of things. And, Vicki, why don't you turn to Tab 12?
20 Ladies and gentlemen, this is very important on what the
21 cause of Robert Kelly's damages are. Was he affected by the
22 childhood sexual abuse? Both experts agree that there are
23 risk factors for negative outcome. If the sexual abuse
24 involves certain things, certain facts, the literature
25 suggests that they are at risk for a more negative outcome.

1 The experts testified that it is highly
2 variable, there is no explanation as to why one person is
3 abused badly and another person is fondled, and the person
4 who is fondled has problems. It has to do with the
5 complexity of the human psyche.

6 But the literature and the experts agree there
7 are certain risk factors. And I walked Dr. Wise through
8 these risk factors. And he had to agree with me, every
9 single one applied to Robert.

10 And I will walk you through them. Male on male
11 abuse. I am not a practitioner. I don't know this, but the
12 literature suggests that when an adult male sexually abuses
13 a boy the outcome is worse than when an adult male sexually
14 abuses a girl or an adult female sexually abuses a girl. I
15 don't know why. Both experts have testified that the
16 literature supports that. This was male on male abuse.
17 Very important.

18 Threats of violence, threats of force. When a
19 child is abused and there are threats involved it tends to
20 be a more negative, long-term outcome than when the child is
21 manipulated or the child is touched or the child is raped
22 without force. This is important, because Robert Kelly
23 testified that while he can't remember the exact sequence of
24 occurrences, they escalated in seriousness and nature. And
25 he described crying during the later events. He described

1 gagging. He described graphically Loholt's penis in his
2 mouth. And he described, at the last event, Loholt saying,
3 if you tell anyone I am going to kill you.

4 Ladies and gentlemen, this is textbook. It is
5 textbook for a poor and a negative outcome.

6 The force involved. Robert Kelly, I anticipate
7 you will probably hear something along the lines, well, it
8 was only four or five events. Ladies and gentlemen, this
9 isn't four or five events of inadvertent touching or
10 touching the boy over the clothes. Robert Kelly set aside
11 the masturbation incident, set aside being fondled the first
12 time down in the room. He was orally sodomized on three to
13 four occasions. He was forcibly raped.

14 One of the risk factors for negative income, and
15 a significant one, is whether there is force in penetration.
16 Make no bones about it, ladies and gentlemen, Robert Kelly
17 was raped multiple times in the summer of 1972. He
18 testified that Loholt ejaculated in his mouth and on his
19 face. It was a completed sex act.

20 No professional intervention. Robert Kelly, but
21 for some anger management counseling, has never seen a
22 counselor. He is an untreated victim of childhood sexual
23 abuse. Both Dr. Wise and Dr. Conte testified that he is in
24 need of counseling, and he is in need of counseling because
25 he was abused. Very very important. And I spent a lot of

1 time on it.

2 Another risk factor is the age at which the
3 child was abused. Robert Kelly was abused at a critical
4 developmental age. He was abused at age nine or age ten.
5 And the experts talked about this. This is different than
6 being abused when you are four or five or six. And it is
7 different, in part, because you are going to remember it,
8 you are going to be able to process some of it, you are not
9 a toddler, you are an early adolescent. This is somebody
10 who is beginning to understand sexuality. If it occurred in
11 the summer of 1972 he would have been between the fourth and
12 fifth grade at that time.

13 It is different when a boy is abused between the
14 ages of 9 and 12 than when he is abused between the ages of
15 12 and 18. And Dr. Wise or Dr. Conte, I can't remember who,
16 explained this. A ten year old doesn't have the ability to
17 process what happened to him, a 15 year old does. Scott
18 Pettit had the ability to process what was happening to him.
19 And he went to his dad. A ten year old developmentally does
20 not. And it is supported in the literature, ladies and
21 gentlemen. If you are abused at age ten your risk for
22 negative outcome is worse than it is if you are 15, and it
23 is worse than it is when you are five. And Robert Kelly was
24 abused during that time period.

25 He was abused with other victims. There were

1 multiple instances of abuse.

2 And then finally at the bottom, this is
3 critical, whether the victim comes from a functional or a
4 dysfunctional family -- Very very important in general, but
5 important in this case when you consider the defense of this
6 matter. I asked both experts, who have reviewed all the
7 records, who have interviewed Robert and who have
8 testified -- or tested Robert, whether there was an abusive
9 home. Even Dr. Wise, their own expert, said no. There is
10 no evidence that this was an abusive home.

11 When considering whether the abuse caused Robert
12 Kelly's problems, despite what Dr. Conte says, one of the
13 leading experts, despite what the literature says about risk
14 factors -- Apply common sense, ladies and gentlemen. Think
15 about it. He had never been sexually abused before or
16 after. Yet he ends up with anger problems. He ends up with
17 relationship problems. He ends up with intimacy problems.
18 He ends up with an inability to achieve an erection. He
19 ends up with problems with his children.

20 He had never been physically abused before or
21 after but for one occasion. Remember, this was one
22 occasion, the golf club. And I don't mean to demean it. I
23 don't mean to underplay it. But I do need to remind you of
24 kind of what happened during the course of the trial.

25 I don't know if you are familiar with subliminal

1 advertising. That is when Coca-cola or Budweiser, or
2 somebody in the Super Bowl, they want to show you a Coke or
3 a Budweiser as many times as they can. They flash it in
4 front of you. And their hope is you buy Coke or you buy
5 Budweiser.

6 The defense did a little of that every single
7 chance they could, the single incident in a lifetime of the
8 family, in a lifetime of good, bad, ups and downs, was
9 flashed before you probably ten times. It is like
10 subliminal advertising. He is hit by a golf club, he is hit
11 by a golf club.

12 Consider the facts. The facts are that Robert
13 testified that he believes his family is supportive. The
14 facts are that he had some tension with his father. There
15 is no question about it. The facts are his dad yelled at
16 him. The facts are in the late 1960s or early 1970s he was
17 spanked, spanked with a belt.

18 I am not suggesting those are good things. Put
19 it in context, ladies and gentlemen. Are they going to lead
20 to the problems that he has, problems with authority,
21 problems with women, problems in the workplace?

22 However, one of the risk factors to consider is
23 whether the family was dysfunctional. I think the evidence
24 doesn't support it. Jovine Umali said she loved the family,
25 she stayed there for a few months. But if that family was

1 disfunctional, if Robert was affected by his father's
2 yelling, if Robert was affected by the golf club, if Robert
3 was affected by the alcoholism, which was never supported
4 factually, you take the victim as you find them. That is a
5 maxim of law in our state, in our country.

6 And if the plaintiff came from a dysfunctional
7 family that is one of the factors that leads to a worse
8 outcome when someone is sexually abused. I don't think the
9 evidence is there, but if that is the case, ladies and
10 gentlemen, it is going to affect his outcome.

11 THE COURT: Counsel, you have seven minutes. I
12 don't know if you want to save any for rebuttal.

13 MR. PFAU: I do, your Honor. Ultimately, ladies
14 and gentlemen, you are going to have to decide how much
15 money to award Robert Kelly. We told you at the beginning
16 of the case that we were going to be asking for a
17 substantial sum. We think the facts support that.

18 We are talking about a life. The rape alone
19 supports a substantial verdict against the defendant. If
20 you take away all the damages, and just look at what
21 happened to that fourth grade kid, it is supports a
22 substantial sum.

23 What is a substantial sum? I can't hazard to
24 guess. 2 million? 3 million? 4 million? 5 million?
25 Maybe that is too high, maybe that is too low. I am not

1 going to provide you with a range other than that, other
2 than I suggest you consider what happened to Robert Kelly,
3 and you consider the lifetime of effects and how it
4 permeates literally every piece of his life.

5 I will save the remainder for rebuttal, your
6 Honor.

7 THE COURT: Thank you, Counsel. All right.
8 Ladies and gentlemen, please now give your kind attention to
9 Mr. Tilden for his closing on behalf of the defendant.

10 MR. TILDEN: Good afternoon, ladies and gentlemen.
11 On behalf of Chuck Gordon and Mike Rosenberger, my partners,
12 and Randy Borland, it has been our privilege to represent
13 the Mormon Church in this case.

14 I would like to perhaps shed less heat on this
15 debate and more light.

16 35 years ago some really really offensive things
17 happened to Robert Kelly. We are sorry they happened to
18 Mr. Kelly. And we are sorry that happens to any child
19 anywhere in the world. But no Mormon official was involved
20 in the action. And when you analyze the law that the Judge
21 has given you, you will conclude we are not legally
22 responsible for what has happened.

23 If you forget the law for a moment, and just use
24 your common sense, we believe you will come to the same
25 conclusion.

1 This is especially the case where this lawsuit
2 is brought, as it has been, 35 years after the events in
3 question.

4 It is especially the case where, as he is doing,
5 Mr. Kelly is suing the Allenbach estate right now for this
6 same harm.

7 It is especially the case where his own parents
8 who actually did know about the abuse at the time did
9 nothing.

10 Mr. Pfau has just told you they want millions of
11 dollars from my client, despite the fact that this did not
12 happen on church property, at a church outing, a church
13 event, and despite the fact that Jack Loholt and Robert
14 Kelly were not brought together by anything we did. They
15 were neighbors.

16 He has told you they want millions of dollars
17 despite the fact that we first met Mr. Kelly in March
18 of 2005.

19 The basic question that you all have to answer
20 here is when a church is responsible or whether a church is
21 responsible for the acts of any given member.

22 On that front, remember that Hitler at least
23 professed to be a churchgoer up until his last days. Bank
24 robbers go to church. When the banks get robbed do they sue
25 the church? Lots of people in car wrecks go to church. Do

1 the victims sue the church? No. We will address why not
2 when we look at the instructions Judge Martinez has given
3 you.

4 This is not a case about theology. For our
5 purposes here the Mormon Church could be any kind of
6 defendant. We could be the Boeing Company or Paccar or
7 Puget Power. We could be the University of Washington,
8 Pacific Lutheran. We could be the City of Kent, King
9 County, the State of Washington. We could be the Kiwanis
10 Club or PTA or Girl Scouts.

11 The plaintiff argues two things in this attack
12 on us. And I would like to address them each in turn. The
13 first, Dr. Allenbach was our agent. The plaintiff talked
14 about that some but they did not show you the instruction.

15 Turn, if you would, to Instruction Number 18.
16 "In this case, during the relevant time period,
17 defendant --" that is us "-- admits that Bishop Borland was
18 acting within the scope of authority. However, if you
19 determine that Dr. Allenbach was an agent of defendant, one
20 of the issues for you to also decide is whether
21 Dr. Allenbach was acting within the scope of authority."

22 Instruction Number 17 actually talks about
23 whether you are an agent. The second paragraph of 18 talks
24 about scope of authority. "An agent is acting within the
25 scope of authority if the agent is performing duties that

1 were expressly or impliedly assigned to the agent by the
2 principal or that were expressly or impliedly required by
3 the contract of employment. Likewise, an agent is acting
4 within the scope of authority if the agent is engaged in the
5 furtherance of the principal's interests."

6 Was Dr. Allenbach our agent for these purposes?
7 Was he acting within the scope of his authority? Leave
8 Alenbach out of it for a minute. Let's talk about what you
9 already know.

10 Mrs. Kelly told us her husband worked at Boeing.
11 She didn't tell us what her husband did at Boeing, or if she
12 did I forgot. Let's assume for a moment he works at Boeing
13 and he is an engineer or works at one of the plants. He is
14 driving to Boeing, going to work, from Boeing going home.
15 He is in a car wreck. Is Boeing responsible? No. It is
16 not within the scope of his authority.

17 Assume on the other hand that Mr. Kelly was a
18 Boeing truck driver and is driving a Boeing truck when he is
19 in a car wreck. Is Boeing responsible? Yes, if it happens
20 within the scope of his authority.

21 "An agent is acting within the scope of
22 authority if the agent is engaged in furtherance of
23 principal's interests."

24 In theory you might argue, well, you know, by
25 driving to work in the morning, that is in furtherance of

1 Boeing's interest because you need to get to work. But
2 Boeing doesn't tell people how to come to work in the
3 morning. Right? They tell you you need to be there at 7:00
4 or whatever time your shift is. It makes no difference to
5 them whether you ride the bus, take the train or walk.

6 So with that background let's take a look at
7 Herman Allenbach. What do we know about Herman Allenbach?
8 We know he was an oral surgeon. We know he was a small time
9 real estate developer. We know he lived out in rural Kent.
10 We know he was active in the church. He was a Sunday school
11 teacher, as a protestant would call it, and his wife led the
12 choir. We know he was not a member of the Mormon clergy.

13 Was he an agent of the Mormon Church for any
14 purpose at all? If he was an agent of the Mormon Church for
15 any purpose at all, what was he assigned to do? He was a
16 Sunday school teacher for older children. Does that make
17 him a 24-hour a day, seven days a week agent of ours? No,
18 it doesn't. How do you know that? Because Judge Martinez
19 has told you what the law is.

20 Mr. Kelly is not a Boeing agent driving to work
21 or from work. Bank robbers who work at Boeing aren't Boeing
22 agents when they rob the bank. That is the answer to the
23 Herman Allenbach question there.

24 Was he a bishop? There was a flavor of this
25 throughout the trial. No, he wasn't. How do we know?

1 Jimmy Allenbach, his son, testified, I never saw my dad up
2 there where the bishop sits. But we know a better way.
3 Admitted fact number 10 tells you that Herman Allenbach was
4 never a bishop.

5 High priest, like any observant male over 45.
6 How do you know that? Admitted fact number 8. And a Sunday
7 school teacher.

8 When his son Jimmy came to him and said at the
9 age of about eight, Mr. Loholt molested my sister and I in
10 the bathtub, did Jimmy come to him in his capacity as a
11 Sunday school teacher of older boys? No. He came to him as
12 his father.

13 The events at issue here had nothing do with
14 Herman Allenbach's relationship with the church. They had
15 to do with the fact that Jack Loholt was a tenant of his,
16 who lived in the basement, and he was a next door neighbor
17 of the Kellys. The best evidence of that is Mr. Kelly's own
18 testimony.

19 Can we have Exhibit 19, Page 32? You all have
20 seen this chart before. Don't bother blowing it up. Who
21 did it? A neighbor. What happened? It is not exactly
22 clear to me what the word is there, but either neighbor or
23 neighbor's friend. No discussion of the church.

24 Turn to Exhibit 20, Page 2. Blow up the part at
25 the bottom, if you would. The client asks that his own

1 sexual abuse with an adult neighbor at age six that lasted
2 for several months not be released to others. He is a
3 neighbor. The Kellys' neighbor could have been anyone. It
4 could have been a Paccar employee, a UW employee, King
5 County, State of Washington, the Girl Scouts or a lawyer,
6 judge, a court reporter or bailiff.

7 Where was the church? The church was four miles
8 away. You heard a lot in opening about the Allenbach
9 compound. You didn't hear anything about it in closing. We
10 showed you a picture of the Allenbach compound. It was a
11 rural area.

12 They pushed the envelope again trying describe
13 Dr. Allenbach's cabin at Lake Kachess as a boy scout camp.
14 It was a cabin.

15 Leave aside for a moment whether Dr. Allenbach
16 was an agent or not, and if he was an agent what the scope
17 of the agency was. There is one other issue that relates
18 directly to this attack on us. The order in which the
19 events happened.

20 Remember, the Kelly boys and the Allenbach boys
21 go to Mrs. Kelly, she waits for her husband, they then come
22 over to the Allenbach home that night. The argument is if
23 Allenbach had done something the abuse -- further abuse
24 wouldn't have occurred.

25 What's the testimony on that? Robert Kelly told

1 us when he met with his parents that night at the dinner
2 table he said for several months there is a lot that, you
3 know, that has happened in the downstairs apartment with
4 Jack.

5 Not only was the masturbation in the field not
6 the first event, it may have been the last. We have no
7 reason to believe that there is any sexual misconduct after
8 Allenbach was informed. None. We know the vast majority of
9 it, at a minimum -- There is a lot that you know happened
10 in the downstairs apartment with Jack. We know almost all
11 of it, at a minimum, happened before Dr. Allenbach heard.

12 I would like to turn to the Bishop Borland
13 argument, their second suggestion that we are responsible
14 for what happened to Mr. Kelly.

15 Could we have Instruction Number 21, please.
16 The Washington statute enacted in 1971 provided -- It goes
17 on to tell you what the statute provided, and the things
18 that are required. What would we say? First, Bishop
19 Borland heard about the Pettit complaint in February
20 of 1972. The instruction doesn't tell you how recent the
21 statute was at the time. But it was relatively brand new.
22 It could have been a month or two old --

23 MR. PFAU: Objection, your Honor. Relevance.

24 THE COURT: The objection is sustained.

25 MR. TILDEN: Second, what did Bishop Borland say.

1 He said, it is an article of my religion that the Pettit
2 communication was privileged, privileged like a priest, I
3 couldn't talk about it. Violation of the statute is not
4 negligence, it is evidence of negligence. Turn to
5 Instruction Number 20 in your book. 20 says just that.
6 Some statutes are just -- it would seem self-evident
7 negligent to violate. Don't go over 35 miles an hour.

8 What is running through Bishop Borland's head
9 when he hears this communication? I am a clergy member of
10 this church. This communication is sacred. I cannot
11 disclose it. I am like a priest. That is what Bishop
12 Borland is thinking. Is it negligent not to report under
13 those circumstances? No, it is not.

14 The statute doesn't compel you to report, or at
15 least it doesn't compel a finding of negligence. You have
16 to weigh what was going on in Bishop Borland's head. And
17 Bishop Borland knew that he was --

18 MR. PFAU: I will object, your Honor. This is
19 speculation.

20 THE COURT: The objection will be overruled. It
21 is argument.

22 MR. TILDEN: Bishop Borland knew he was clergy and
23 he knew that this communication was confidential.

24 There is a large debate in the case what Bishop
25 Borland was told. And I think Mr. Pfau pushed too far on

1 that. The first question is what happened to Scott Pettit.

2 Did Scott Pettit testify that he was repeatedly
3 assaulted, that it went on all night, touching his penis and
4 testicles? My recollection of Pettit's testimony is that it
5 was obvious that Loholt's hand was trying to get somewhere.
6 I have no recollection of whether he actually made contact.
7 Pettit rolled over in the sleeping bag. He may have rolled
8 over again, but then it was over. I am not defending the
9 conduct in any way, but it did not go on all night. And
10 when Scott Pettit woke up he wondered whether it really
11 happened. He then went to his parents.

12 His dad, quite concerned, took that problem to
13 Bishop Borland in confidence. He told Bishop Borland there
14 has been inappropriate touching. Bishop Borland came in
15 hear and he told you inadvertent, uncomfortable --
16 uncomfortable horse play. They are awfully critical of that
17 recollection. They are awfully critical.

18 How long ago was 1972? Mr. Pettit is 75 now.
19 He was 40 then. Bishop Pettit (sic) was 33 at the time. If
20 you were waiting for the Microsoft stock offering, the IPO,
21 you would have 15 more years to wait. It was a third after
22 century ago. Bonanza, Laugh In were on TV. To personalize
23 it, I had no children, no wife, no job, no degree. I had
24 never kissed a girl and I had no driver's license. Those
25 last two may have been related. It was a third of a century

1 ago.

2 And they come in and criticize and old man's
3 recollection from around the time of Watergate? Ten years
4 after the events in issue here, but a quarter of a century
5 ago Pope John Paul II was the subject of an assassination
6 attempt. That seems like the distant past.

7 18 years ago I was married. I recall proposing
8 to my wife. And there was a time when the 30 seconds of
9 proposal and acceptance I could play like a movie in my
10 head.

11 MR. PFAU: Objection, your Honor. I understand it
12 is argument.

13 THE COURT: Overruled.

14 MR. TILDEN: There was a time when I could play
15 the movie in my head over and over again, 30 seconds. Maybe
16 it was 20. I don't know. But I could remember it all. 18
17 years later I can only remember brief snippets, like a
18 painting that has been torn up, I only have a few pieces
19 left. In 18 more years when a third of a century has
20 passed, all I will know is that she said yes. They come in
21 here and they are critical of a third of a century old
22 recollection.

23 What is Bishop Borland certain of? He is
24 certain that Scott felt uncomfortable. He is certain he
25 took immediate action to get rid of the scout master.

1 Mr. Pfau says, wouldn't that be highly unusual
2 if you are a boy scout? Well, they got a new scout master
3 assistant the same day, Lloyd Berry. It is on the chart.
4 If you are a kid you know your assistant scout master has
5 been replaced. He took it as seriously as he thought.

6 What are we are sure Bishop Borland was not
7 told? No one suggests that Bishop Borland was told about
8 oral sex, ejaculation or semen. There is not even a hint
9 that Bishop Borland was told about the masturbation in the
10 field. Bishop Borland knew far less than the Kelly parents,
11 and he knew far less than the Allenbach neighbors.

12 Part and parcel of the Bishop Borland argument
13 is the issue of when did this happen. I loved the JFK
14 example. I remember exactly where I was. I was in third
15 grade and my teacher came in in hysterics. I was not in
16 second grade. I was not in fourth grade. I was not in
17 fifth grade. And I was not in first grade. I was in third
18 grade. And I am absolutely positive I was in third grade.

19 I believe that the events here would make an
20 extraordinary impression on Robert Kelly. And I believe him
21 when he told us initially when this happened. Like the
22 shooting of JFK, Robert Kelly told us when this happened.
23 He told us that it either happened when he was six or when
24 he was nine.

25 Keep in mind, unlike some parts of the country,

1 here we go to school until the end of June. Robert Kelly
2 was nine up until late June of 1972. So he would have got
3 out of school in late June 1972. The summer in which Robert
4 Kelly was nine, if summer is defined when you play outside
5 and chase snakes and play baseball, the summer when Robert
6 Kelly was nine was 1971.

7 Mr. Kosnoff said in opening there was only a
8 single shred of evidence that it happened when he was six.
9 I forget Mr. Pfau's exact words now, but it was along the
10 same theme. That is not true. There is way more than a
11 thread.

12 Can we have the when did it happen chart? First
13 his mother. She testified that Mr. Loholt moved in late
14 '69, '70 or '71, and that it happened within a few months of
15 his moving in. She didn't know him well. In fairness to
16 the truth, she also testified that it happened within a few
17 months of his moving out.

18 So what do we make of Ms. Kelly's testimony
19 there? I think we have to conclude that there is not
20 anything in Mrs. Kelly's testimony that would help you
21 answer the question when. It can't have happened within a
22 few months of moving in in '69 or '70, and it can't have
23 happened within a few months of moving out in '73 at the
24 same time. So she has told us two different things and they
25 can't both be right.

1 So let's move off that Mrs. Kelly comment. She
2 was asked by her own -- her son's own lawyer, Mr. Kosnoff,
3 March 2nd, 2005, what happened in approximately 1971. This
4 is their thinking, not ours. We didn't make this question
5 up, although we couldn't improve on it. They didn't say
6 what happened in approximately 1972 or '73. He said, what
7 happened in approximately 1971. And if Mr. Gordon and I
8 could have written the question, that is one we would have
9 written.

10 What did Mr. Kelly say? He said in Exhibit 20,
11 pages 2 and 3, two separate events six months apart, that he
12 was abused by a scout master at the age of six. And he said
13 on the sheet we looked at a moment ago that he was a
14 sexually abused when he was nine by a neighbor. The summer
15 when he was nine, the summer when you can play outside, is
16 1971. He would have quit being nine in '72, about the time
17 school got out.

18 The last question on the Borland complaint
19 front. If Bishop Borland at the time heard something that
20 he felt constituted sex abuse or reasonable cause to believe
21 sex abuse had occurred, if he was going to ignore his
22 confidentiality obligation, if the Kelly abuse was still in
23 the future, so that anything Bishop Borland did may have had
24 some effect on -- Remember if it was in '71 it already
25 would have occurred. Bishop Borland heard in February '72.

1 If all of those things what would have happened? They have
2 not brought anyone in here to tell you what the police would
3 have done with a complaint in '71.

4 What can Bishop Borland say consistent with his
5 confidentiality obligation? It is my understanding that
6 some improper conduct occurred in Kent? How much can he
7 say? What would the police have done? He certainly can't
8 identify Scott Pettit's name.

9 What did Dorothy Kelly say? These things were
10 swept under the rug at the time. Do I believe that? I am
11 not prepared to buy it hook, line and sinker. But I kind of
12 like to wish I had heard someone come tell us what would
13 happen at the time, and no one did. There has been a total
14 failure of proof on this issue of what would have happened.

15 In order to find that the church is liable on
16 this front you have got to find that Bishop Borland was told
17 something that gave him reasonable cause to believe it was
18 sex abuse, that it was not privileged and that he could have
19 talked about it, that the police would have done something
20 had they heard, and that Mr. Kelly's abuse -- I am up to my
21 fourth finger -- had not already occurred.

22 The burden of proof instruction in here tells
23 you that the burden rests on the plaintiff. They have to
24 convince you that their version of the facts is more
25 probably true than not. Each of those four prongs they have

1 to prove more probably true on. When you add them up they
2 can't do it.

3 We do know how some people would have acted in
4 the early '70s. Not the police. Not CPS. We know how the
5 Kelly parents acted. From the standpoint of 2006 it is
6 pretty easy. This is 1971. Was the world different? I
7 don't know. You have heard no testimony.

8 I will make one more point about the reporting
9 statute and then move on. Dr. Allenbach himself was an oral
10 surgeon and a practitioner. He had a reporting obligation
11 independent of the fact that he was a Mormon. He would have
12 had a reporting obligation whether he been a Catholic,
13 atheist or a Jew, whether he had been an American, an
14 Englishman, whether he had been in the Kiwanis club or not.

15 I like to change subjects if I could and talk
16 about damages. Could we have the first chart with the four
17 experts up please? I am unable to clear my little red
18 things but I think we can survive with what we have got.
19 This is the expert lineup in this case. And it is only a
20 slight stretch to say it is four against one.

21 Mr. Pfau wants you to accept Dr. Conte's
22 testimony hook, line and sinker and jettison the testimony
23 of the others. What do we know about Dr. Conte and the
24 others? A quick list: Dr. Conte did not review, prior to
25 forming his opinions, any of the anger control files or

1 Dr. Ben Hamida's file.

2 He disregard grossly exaggerated interview
3 evidence from Mr. Kelly. He concluded that Mr. Kelly was
4 not intentionally misreporting symptoms, although Mr. Kelly,
5 to his credit, sat on the stand and told you that he had
6 intentionally over reported.

7 He agrees with the MMPI conclusions of Dr. Wise
8 and Dr. Ben Hamida. That while Mr. Kelly has problems, and
9 we don't deny that, his essential personal profile is within
10 normal limits.

11 Could we have the Conte chart? Mr. Pfau told
12 you a few things about Dr. Conte's testimony. I would like
13 to tell you a few more. Mr. Pfau criticized Dr. Wise for
14 concluding that victims of rape, on a more probable than not
15 basis, wouldn't have symptoms later on. Dr. Conte told us
16 the same thing.

17 He agrees with Dr. Finkelhor, who he recognizes
18 as a world authority, that fewer than 20 percent of child
19 sex abuse victims have significant psychological problems as
20 adults. He told us that the impact on Robert Kelly, even
21 from a professional point of view, is relatively subtle. He
22 is not suggesting that the abuse caused every aspect of this
23 man's life. He does agree with Dr. Wise, that there is a
24 biological basis for anxiety/depression, that Mr. Kelly is
25 certainly not clinically depressed, that the MMPI validity

1 scales are superior to what he did.

2 And Rachelle Cope told him that Mr. Kelly was
3 abused by his father, sexually abused by his neighbor and is
4 living at home because he needs the support of his family
5 for this case.

6 We know Mr. Kelly is capable of skewing his
7 answers when it serves his purpose.

8 Can we have Page 17, Exhibit 4? This is how
9 Mr. Kelly completed a chart for Dr. Ben Hamida in 2001 when
10 it was in his interest to look like a healthy person. It is
11 Page 4 of Exhibit 17. You will have it. And what it shows
12 is a person with no problems.

13 Could we have Page 11 of Exhibit 19, please?
14 This is what Mr. Kelly told Dr. Conte in 2005 when it was in
15 his interest to look ill. Not just anxiety and depression,
16 but look at the scores. There is a bar graph above this on
17 the page that you will have when you are back there, phobic,
18 anxiety, extremely atypical; paranoid ideation, extremely
19 atypical; psychotic, extremely atypical.

20 Mr. Kelly is a smart guy. What did he tell
21 Dr. Ben Hamida? I am not suicidal. What did he tell Conte?
22 I am suicidal. What did he tell Dr. Ben Hamida? Anger
23 problems at home. Did he mention it to Dr. Conte? No. The
24 best evidence here is Mr. Kelly's own testimony.

25 Could we have Exhibit 20, Page 2? When

1 Mr. Kelly was on the stand Mr. Kosnoff asked him about some
2 of his answers to Dr. Wight and Dr. Waterland. And he said,
3 I skewed the answers because I wanted to see my son. And,
4 God knows, that is the best reason I can imagine to skew
5 answers. But those are answers that you would skew to make
6 yourself look healthy, like the ones we just saw.

7 I would like to show you four things that
8 Mr. Kelly said at the time he was trying to make himself
9 look good. The bottom of Exhibit 20, Page 2. Let's blow
10 that up one last time. Skip the golf club. He described
11 his father's anger as explosive. When asked if he felt safe
12 and connected growing up he said no. We didn't say that.
13 Mr. Kelly said it.

14 Could we have Exhibit 20, Page 3? He stated he
15 did not feel safe at home.

16 Exhibit 19, Page 32. 'Physical. Dad hit me
17 with a golf club, caused a huge bruise. How did you feel?
18 Pain, guilt, anger, emotional pain, that's then and now.
19 Emotional. Father at 39. Dad's regular emotional
20 outbursts, yelling. Very hurt, defensive."

21 Exhibit 19, number 33. "Track your emotional
22 energy. Describe a recent situation when you felt strong
23 emotions. Name the feeling of anger, whether it is
24 frustration, tension or anything else. Rate the feeling
25 from one to ten. Feeling anger, level nine."

1 Remember Mr. Kelly is trying to look good for
2 these people. "My dad was yelling at my nieces and nephew
3 the other morning. I asked him to stop yelling at the kids
4 and he yelled at me, no, I will not. This set me off.
5 Totally angry. My dad yelled at me since I was a kid, and I
6 see that this pattern has been repeated with a new
7 generation." Mr. Kelly's own diagnosis of what has gone on
8 in his family. That is all I have for that.

9 Julie Ellis walked in here, his ex-wife. I
10 don't know if you could feel the courage in her testimony,
11 but she did not want to be here. She did not want to be
12 here. And she believes in the lady with the scale and she
13 raised her hand and she told the truth, and she didn't want
14 to do it. She said Robert felt like the black sheep at
15 home, he was abused at home. Asked, are you talking about
16 sexual abuse by the neighbor? No, abused at home. She said
17 that Mr. Kelly called her a year ago and told her, don't
18 tell the jury my mother was an alcoholic. She told us that
19 his brother has built a house in the field in front of his
20 parents. Whatever else you conclude in this case, I want
21 you to conclude Mrs. Ellis -- Ms. Ellis has a lot of
22 courage.

23 They did not call Mr. Kelly's dad or his brother
24 or sister.

25 MR. PFAU: Objection, your Honor.

1 THE COURT: The objection will be sustained.

2 MR. TILDEN: Mr. Kelly admits that he has never
3 sought treatment, other than this brief visit in 2001 for
4 any of his symptoms. An action speaks louder than words.
5 When Mr. Kelly finally called someone in 2005 he didn't call
6 a doctor, he called a lawyer.

7 I want to talk to you some about the statute of
8 limitations, why we are here in 2006 for events in 1971 or
9 '72. This is the law that Judge Martinez has given you on
10 the statute of limitations. You must bring an action for
11 childhood sexual abuse within the later of the following:
12 Three years of your 18th birthday. That would be 1983 if
13 you are Mr. Kelly. Three years of the time the victim
14 discovered or reasonably should have discovered that the
15 injury or condition was caused by the acts, that his
16 problems in life were cause the by the sex abuse, his
17 contention. Or within three years of the time that he
18 discovers that the sex abuse caused the injury for which the
19 claim was brought.

20 I will confess to you that I don't know the
21 difference between B and C. But maybe you can divine one.
22 In all events, Mr. Kelly's legal obligation is to bring a
23 lawsuit within three years of learning the connection
24 between the abuse and the acts.

25 Now, he has told us, and Dr. Conte has told us,

1 that he is psychologically unsophisticated. But what else
2 do we know? We know that his mom had a meeting or gathering
3 in either 1971 or '72 with family members. We know that she
4 attributed problems early to this. We know that he told
5 Ms. deGuzman in the late 80s, '90, '91 at the latest, I was
6 sexually abused as an explanation for his conduct. Jovine
7 Umali told us that he told her in the '91 to '95 time frame.
8 Julie Ellis told us he told her early in their relationship.
9 He told Dr. Wise and Dr. Waterland in 2001.

10 The first notice to us was in 2005. Why does
11 this matter? What position would you all be in if this
12 claim had been brought in 1982? Allenbach --

13 MR. PFAU: Objection, your Honor.

14 THE COURT: Overruled.

15 MR. TILDEN: Dr. Allenbach would still be alive,
16 and he would be alive for 17 more years. This debate about
17 what was told to Pettit or Borland would be a lot fresher in
18 their minds. The order in which the events occurred would
19 be fresher. What year it happened, what Mrs. Kelly
20 believes, what Robert Kelly believes, all fresher.

21 The discrepancies we have got in this case from
22 the testimony are to be expected when witnesses are 70 and
23 they are talking about things when they were 35. That is
24 what the statute of limitations about.

25 When does the statute of limitations run? It is

1 their position it hasn't started to run yet and they can sue
2 us forever.

3 I want to talk to you about a handful of
4 miscellaneous things, and then go to the verdict form. The
5 burden of proof, Instruction Number 8. I hinted at this a
6 minute ago because I got ahead of myself.

7 "When a party has the burden of proof on any
8 claim or affirmative defense by a preponderance of the
9 evidence --" and that is all of the burdens of proof in this
10 case "-- it means you must be persuaded by the evidence that
11 the claim or affirmative defense is more probably true than
12 not true."

13 Their claims are that we were negligent with
14 respect to either Dr. Allenbach or Bishop Borland's
15 activities. Our affirmative defense is the statute of
16 limitations. The burden of proof on all of them is a slight
17 tipping of the scale in favor or against.

18 We don't dispute that Mr. Kelly was abused. We
19 don't dispute he was abused six times. We don't dispute
20 that he was abused by Jack Loholt. We don't dispute any of
21 those things. The burden of proof has been carried on all
22 of that, because we don't dispute it.

23 There are serious questions about when it
24 happened, the order of it happened, who was told what and
25 who would have done what. And the burden of proof has not

1 been carried on any of those issues. Collectively these
2 problems prevent Mr. Kelly from carrying this burden.

3 This is especially the case where the evidence
4 has been manipulated. You saw what he told Dr. Ben Hamida,
5 Exhibit 17, 2001, I am fine. What did he tell Dr. Conte in
6 2005? I am really not fine. We know that he told his
7 ex-wife to come in here and not tell you some important
8 things.

9 He claims here to just be in the initial stages
10 of figuring out his problems and how they relate to the
11 abuse, but he has been telling girlfriends and a wife that
12 for 15 years.

13 He has told us here that the abuse occurred when
14 he was ten or 11 or 12, at a time before the lawsuit when he
15 presumably wasn't thinking about a claim. He told people
16 who counted it happened when he was six or nine.

17 And, finally, it is a minor thing, but like the
18 mark on the leopard maybe it helps you know it is true. He
19 told you that he worked on merit badges with Jack Loholt.
20 Well, in the Mormon troop you work on merit badges when you
21 are 12 or 13 or 14. His friend, Jimmy Allenbach, was a year
22 younger than him. So Jimmy is 12 at the youngest, Robert is
23 13. Robert was born in '62. He turned 12 in 1974. He
24 turned 13 in 1975. This is long after anybody contends the
25 abuse happened in this case.

1 Mr. Pfau has talked about a cover up. You heard
2 Jack Loholt testify that he didn't masturbate in front of a
3 field, on the videotape -- masturbate in a field in front of
4 Mr. Kelly. Mr. Gordon and I speak for the Mormon Church on
5 only about one zillionth of the possible things, but we
6 speak for them on this subject. We don't believe that. We
7 think he did. We are not covering it up.

8 They asked Bishop Pettit -- former Bishop Pettit
9 a question about what he told Randy Borland in 2005 -- in
10 2005 when they asked him what he told him 33 years ago. Did
11 Bishop Pettit say it was confidential? No. He told them.
12 He told them. They asked for old records. We have produced
13 them. That comment is offensive.

14 I want to turn your attention to the verdict
15 form real quick. I don't know if this is in your package.
16 But you will be asked to answer one or more questions.
17 Question number one, "did plaintiff commence this action
18 within the period of time required by law? Yes or no." For
19 the reasons we have outlined we believe the correct answer
20 is no. And we that we have carried our burden of proof on
21 that issue. This lawsuit should have been commenced a long
22 time ago.

23 You will then see after the answer a direction
24 to you that follows many of them. "If you answered yes,
25 keep going. If you answer no, stop."

1 Let's round out the remainder of the questions.

2 "Do you find that the defendant --" that's us "-- is
3 negligent?" We believe the correct answer is no.

4 "Was such negligence a proximate cause of injury
5 to the plaintiff?" Proximate cause is a fancy legal work.
6 I guess it is two fancy legal words. Here is what it means.
7 "The term proximate cause means a cause which in a direct
8 sequence unbroken by any new independent cause produces the
9 injuries or damages complained of, and without which such
10 injury or damages would not have happened." In order to
11 find the Mormon Church negligent you mind find that
12 something we did caused this, and had we not done it, it
13 would not have happened.

14 Put another way, something we failed to do
15 didn't stop it. You have to conclude more probably than not
16 that if Bishop Borland had called the police, and consistent
17 with his confidentiality obligation said, I have reason to
18 believe there has been some abuse in the Kent neighborhood,
19 that that would have prevented any subsequent abuse of
20 Mr. Kelly.

21 As part of that you have to conclude that the
22 abuse hadn't already occurred. We think it had, and he said
23 it had.

24 "Was the negligence the proximate cause of
25 injury to the plaintiffs?" No.

1 "Do you find that any of the following
2 non-parties were negligent in this case?" This is
3 Dr. Allenbach and the Kelly parents.

4 Instructions 9 and 10 tell you "negligence is
5 the failure to exercise ordinary care." "Ordinary care is
6 what a reasonable person would have done at the time." What
7 would reasonable parents have done at the time?

8 The contention here is that Bishop Borland is --
9 the Mormon Church is wildly negligent for failing to call
10 the police about a boy we never met. He wasn't injured on
11 an outing -- a Mormon outing.

12 Here we have parents of a boy who has seen an
13 instance of masturbation in the field and do nothing. Is
14 that reasonable behavior for a parent, besides go next door?
15 You have the man next door, who has heard about it and done
16 nothing.

17 You can find fault, if you want, with our
18 removal of Mr. Loholt as an assistant scout master, but we
19 are the only party in this case that did anything. We are
20 the only one.

21 We believe you should find all three of these
22 individuals negligent. We don't believe you will conclude
23 they acted, at least in the sense -- with respect to the
24 Kellys as parents should, with respect to Allenbach as a
25 landlord and father himself should.

1 Our favorite piece of evidence with respect to
2 Dr. Allenbach on this score is one that came out maybe
3 sideways during the trial. But Mr. Kelly is now suing
4 Dr. Allenbach's estate and Mrs. Allenbach, his still living
5 wife. He believes he is at fault.

6 "Do you find that Herman Allenbach was an agent
7 of defendant acting within the scope of his authority with
8 respect to acts or omissions of Loholt?" The answer to this
9 has to be no. He had a landlord/tenant relationship with
10 Mr. Loholt. He had a employer/employee relationship with
11 Mr. Loholt. Herman Allenbach's relationship with the church
12 had nothing do with this. Herman Allenbach taught the 14
13 and 15 year old boys Sunday school.

14 "Assume 100 percent represents the total
15 combined negligent that proximately caused the plaintiff's
16 injuries. What percentage goes to each?" We are on the
17 first page.

18 Your Honor, there should be a Herman Allenbach
19 here on question 7.

20 In all events, we believe that any -- we believe
21 the proper percentage applied to us is zero. We believe the
22 statute is filed well beyond the statute of limitations and
23 you should never get to this question. But if you are here,
24 we bear a tiny portion of the responsibility compared to
25 people that knew about the masturbation in the field, knew

1 about the Allenbach boys in the basement, knew it was their
2 own son and did not do a thing. That is question 8. You
3 divide up the percentages.

4 "What do you find the amount of plaintiff's
5 compensatory damages to be?" We believe the number
6 suggested by Mr. Pfau or the ranges were remarkable. Think
7 about what you invest that money at and what the return
8 would be.

9 Then finally question 10. There is an argument
10 that we are all beating ourselves up about this, all of us.
11 Maybe more than we should. There was a bad actor here.
12 Jack Loholt. And he was a Mormon, the same way that Charles
13 Manson probably belonged to a church. Hitler did belong to
14 a church. 40 percent of America goes to church, and a lot
15 of them do bad things.

16 Let's flip it around. Mr. Pfau spent an hour
17 talking about things he thinks are bad, and I have spent
18 most of my time on a similar subject. Let's assume it was
19 something good for a second. Hank Aaron has 755 home runs.
20 Who gets credit for that? His dad who taught him to play
21 ball? His coach in Mobile? His priest? His minister?
22 Youth leader? Professional baseball coach? No. When you
23 go to the record book none of those people get any credit.
24 Hank Aaron hit the home runs. Jack Loholt did this. And we
25 believe that anyway you carve up responsibility for it the

1 vast majority of it rests with him.

2 That is about all I have to say. I want to
3 conclude with a few remarks. First, we are just here to try
4 one case. There are other sex abuse cases in the country.
5 We all know it. And many of them will have different
6 outcomes. We are only here about this one.

7 Second, it is hard emotionally sometimes to send
8 a plaintiff out of court. It is hard. But you can't think
9 about it. You have to do it.

10 Instruction Number 1. This is the first
11 instruction. "You must not be influenced by any personal
12 likes or dislikes, opinions, prejudices or sympathy." This
13 is a hard thing to do. When you come in the courthouse
14 downstairs on the first floor you go through a metal
15 detector and all the metal gets left behind. When you walk
16 through these doors or those you go through a similar
17 detector, and all the sympathy and all the prejudice has to
18 be left behind. That is your job. And I am not here to
19 tell you it is easy. But the judge has been quite clear
20 about it.

21 Why is it important? If we are not going to
22 follow that rule then anybody can be liable for anything.
23 Right?

24 The symbol of justice in America is woman with
25 blindfold and scale. Who knows what is in her other hand?

1 I have been a lawyer for 25 years and I was 50 before I
2 learned this. Don't beat yourself up if you don't know. In
3 her other hand is a sword.

4 There are statues of lady justice in which the
5 scale is down by the side and the sword is in the air. It
6 gives you an entirely different picture of what goes on in
7 the courthouse. The scale symbolizes the careful weighing
8 of the evidence and the following of the instructions. But
9 the sword symbolizes the courage to do what you have to do.
10 The scale is no good if you refuse to do what you have to
11 do.

12 The Judge has told you in Instruction Number 3
13 what evidence is. The evidence here is the documents and
14 what the witnesses say. The witness chair was there, and
15 you saw them all.

16 No one sat in that chair and told you that we
17 knew Mr. Kelly at the time, we knew he was being abused,
18 that he was abused on Mormon Church property or on an
19 outing. No one sat there and told you that we introduced
20 Jack Loholt to him. They met in his neighborhood. It could
21 have been any neighborhood.

22 Everyone told you that Mr. Kelly was aware of
23 the abuse at the time, that Kelly parents were informed and
24 Dr. Allenbach knew. Mr. Kelly told you it happened when he
25 was six. It happened when nine. His girlfriends and former

1 wife told you he connected the abuse at the time years ago.
2 Mr. Kelly told you that the cycle of abuse existed in the
3 home and started early.

4 Mr. Kelly's lawyers told you in a question to
5 Mrs. Allenbach that it happened in 1971. In a courthouse
6 about a mile from here they are telling someone that
7 Dr. Allenbach --

8 MR. PFAU: Objection, your Honor.

9 THE COURT: The objection is sustained.

10 MR. TILDEN: Lawyers spend all of their time
11 wondering what the jurors think. I don't know if you all
12 have spent any time wondering what the lawyers think. We
13 think when you analyze the evidence through the burden of
14 proof this is not a close call, which is not to say that
15 Mr. Kelly did not have five or six really, really, really
16 bad things happen to him. That's not the issue for you. If
17 we were to address that issue we would have agreed, we did
18 agree, and we would have been gone a week and a half ago.
19 The question instead isn't Mr. Kelly, it is who is
20 responsible for the events that occurred.

21 That's all I have about the case. I want to
22 tell you one other thing and then sit down. I think I have
23 three minutes. All the lawyers in the case, we are here
24 because we think this is really, really neat. You don't
25 know us. We don't know you. You have been called off the

1 street to answer questions for your fellow citizens whom you
2 have never met. It is amazing, isn't it?

3 5,000,000 people will be called to jury duty
4 this year. 1,000,000 people will serve. 80,000 juries.
5 The jury is the most powerful arm of the government. You
6 don't feel powerful because you are made to come. You don't
7 have a choice. The power is split up each year among
8 1,000,000 of you.

9 Imagine for a second there was only one juror,
10 and that person answered every question in American courts
11 all the time. We would know that person's name and we would
12 hate them. And the British figured out a long time ago that
13 what you ought to do with power that immense is spread it
14 up, divide it equal.

15 The jury system fulfills the promise that every
16 man in America will be a king or a queen.

17 Thomas Jefferson said that the right to trial by
18 jury was more important than the right to vote. Mr. Gordon
19 and I, I don't know whether we believe that or not, but we
20 really like the way it sounds. Thank you very much for your
21 time.

22 THE COURT: Thank you, Counsel. Members of the
23 jury, once again, please give your attention to Mr. Pfau for
24 a short rebuttal. Six minutes, Counsel.

25 MR. PFAU: Thank you, your Honor. Ladies and

1 gentlemen, the message was delivered in sheep's clothing by
2 Mr. Tilden, but make no bones about it, it was a classic
3 rape defense, pick apart the victim, blame others. It is an
4 effort, ladies and gentlemen, to take you away from the
5 facts. Think about the facts. Think about what you have
6 written down. Think about what you said.

7 I have limited time so I can't address every
8 point, but I want to address some important points.
9 Mr. Gordon said there are other sex abuse cases in the
10 country. There are other sex abuse cases in this state.
11 And there is a reason that are sex abuse cases in this state
12 dating back many many years. And that is because Washington
13 has one of the broadest statute --

14 MR. TILDEN: Your Honor, we didn't say any of
15 this, and we deny that.

16 THE COURT: The objection will be sustained.

17 MR. PFAU: Let's take a look, ladies and
18 gentlemen, at Exhibit 25. This is the statute of
19 limitations. It has some markings on it. It is the
20 instructions on the statute of limitations.

21 Mr. Ellis (sic) said, I didn't know the
22 difference between -- Mr. Tilden said, I didn't know the
23 difference between (b) and (c). I know the difference
24 between (b) and (c). And it is very very important. "Any
25 person bringing an action for recovery of damages caused by

1 childhood sexual abuse must commence his lawsuit within the
2 latter of the following periods:" And I point your
3 attention to period (c), which applies here, "within three
4 years of the time the victim discovered that the act cause
5 the injury for which the claim is brought."

6 It is a complicated question, ladies and
7 gentlemen. In order to trigger the statute of limitations
8 the plaintiff needs to know that the sexual abuse caused the
9 injuries for which he is bringing this suit.

10 Dr. Conte and Dr. Ben Hamida have both testified
11 that he is psychologically unsophisticated, and he has no
12 idea what the effects are. That is the standard. It is
13 not, were you abused three years later. It is not, did you
14 know you were abused. It is not, did you tell a girlfriend
15 you were abused. Mr. Tilden pushed the limits when he said
16 that the conversations with girlfriends had to do with the
17 effects of the abuse.

18 And even if that had been the case, until
19 Mr. Kelly understands through therapy or through evaluation
20 how the abuse affects him the statute of limitations has not
21 begun to run. That is the law in Washington.

22 I want to turn your attention to another issue
23 which is seemingly confusing. And I wish I had more time to
24 dedicate to it. It is question number 10 on your verdict
25 form. And this is the segregation of damages between Loholt

1 and the Mormon Church.

2 "What percent of damages in your answer to
3 question 9 do you find were caused by the negligent conduct
4 and what percentage were caused by Mr. Loholt's intentional
5 conduct?" That is not an allocation of fault. They tried
6 to argue that it is. Who is at fault, what percentage of
7 fault.

8 The way this is interpreted, ladies and
9 gentlemen, is, are there any damages that were caused by
10 Loholt's intentional conduct that were not caused by the
11 negligent conduct.

12 I will give you two examples. One very very
13 relevant. Loholt can be characterized as an animal, what he
14 did to these kids. A tiger. A tiger escapes in the zoo and
15 mauls a child. A lawsuit ensues. Do you sue the tiger for
16 his intentional acts? The tiger knew what he was doing.
17 Loholt knew what he was doing. Or does the lawsuit lie in
18 negligence for the actions of the gatekeeper that let the
19 tiger out? It may seem like a silly analogy, but that is
20 the proper method to analyze this. It is not an allocation
21 of fault. It is a segregation of damages.

22 Another way to think of it is, but for the acts
23 of the Mormon Church, Loholt's intentional acts would have
24 not have damaged the child.

25 A couple of things I want to comment on, and

1 then my time will be up. We talked about Julie Ellis having
2 the courage to come in here. Ladies and gentlemen, she was
3 seething with hatred. She hates my client. Consider that
4 when you consider the source of some of her comments.

5 Interesting. The time. Look at the facts.
6 Don't look at people talking about what age they remember.
7 Yes, Robert Kelly was age nine in the summer of 1971. He
8 was also age nine in the summer of 1972. But that's not
9 important. What is important is what acts support and what
10 facts support the summer of '72. We have been through that.

11 Interesting. What could we have done. What
12 could we have done. The parents, they are to blame.
13 Dr. Allenbach is to blame. Dr. Allenbach and the parents
14 did do something. The parents went to Dr. Allenbach. They
15 went to him because they knew he was a neighbor, and they
16 knew he was affiliated with the church, and they knew that
17 Loholt was affiliated with the church. They asked him to
18 take action. And he was gone within months.

19 Consider an important fact. That sleep over
20 took place in 1971 -- in October of 1971. It was Brent
21 Allenbach's friend. All the evidence suggests that this was
22 in the summer of 1972, that Dr. Allenbach, while potentially
23 not acting quick enough, did remove Loholt when he received
24 the complaint about the masturbation. He bought him a
25 house. He got him off the property.

1 Would he have been in the house in 1971 if the
2 Kellys had made that complaint prior to that time? It
3 doesn't make sense.

4 Causation. What could we have done, what could
5 we have done, what could we have done. They could have done
6 a lot.

7 Bishop Borland, you need to assess his
8 credibility. He is either not telling you the truth, ladies
9 and gentlemen, or he didn't do anything to investigate on
10 what were clear facts and red flags. From his mouth he gave
11 you all the things he could have done, call the police, call
12 CPS, investigate, etcetera, etcetera, etcetera. All roads
13 lead to 152nd Street.

14 The evidence is, that while Robert Kelly was not
15 a Mormon, he lived right next door to someone who was the
16 youth pastor. And on the issue of agency, don't fall for
17 this analysis that if he heard about the information when he
18 wasn't at church it is not information he can do something
19 about. Even if Dr. Allenbach heard about the information
20 when he was at home, through his son, when he went to church
21 and he was a youth pastor working with Loholt he possessed
22 that information and he could have gone to the bishop. And
23 the bishop gave you a litany of ten things, including taking
24 a brick hammer to the victim, that he could have done and he
25 would have done (sic).

1 Finally, be aware of his confidentiality.
2 Confidentiality is what the bishop said it is. They said it
3 was confident in the deposition, they waived it, and they
4 came into trial.

5 He went to Loholt with the information he had.
6 He could have gone to the police with the information he
7 had.

8 Thank you. I agree with everything Mr. Tilden
9 said about the jury and the jury process. We believe in it.
10 We believe that will you do the correct thing. Thank you.

11 THE COURT: Thank you, Counsel. All right. As I
12 told you, we are going to go ahead and release you for
13 tonight. Tomorrow morning I want you back in our jury room
14 at the same time.

15 You are not allowed to deliberate, not allowed
16 to discuss the case amongst yourselves until all of you are
17 present. All right? All of you have to be there. Then you
18 start the deliberation.

19 The flip side of that is you are not allowed to
20 deliberate with anyone else other than the jurors present.
21 That includes our staff. If Ms. ^ Courisma or Ms. Williams
22 are coming in there, they will knock on the door to announce
23 that they are coming in to talk to you for whatever reason,
24 you are to stop deliberating at that point in time. You are
25 not allowed to deliberate with anyone else present in that

1 room.

2 For your information, once we begin
3 deliberations we will release you at 4:30 instead of 4:00.
4 If that effects ferry schedules or anything else like that,
5 you need to let me know, or let Ms. Cuaresma know it is
6 going to be a problem.

7 The other thing we do for you, aside from
8 holding you for another half hour, is we provide lunch. If
9 you have been bringing your lunch, don't worry about it
10 tomorrow. If you are deliberating through lunch we will
11 provide lunch for you.

12 Any questions? Great. Remember the case is not
13 to you yet. It will not be to you until you come into our
14 jury room tomorrow.

15 What you will find is my original copy of the
16 instructions that are signed. You will find the special
17 verdict form that you not have in your packets, but it is
18 attached as part of this. And will you find all of the
19 exhibit that were admitted. At that point in time, once
20 everybody is there, you are free to begin deliberations.

21 Have a great evening. We will see you all
22 tomorrow. Just like we ask you to leave your notes, we ask
23 that you leave your copy of the instructions here.

24 (At this time the jury left the courtroom.)

25 THE COURT: Counsel, thank you very much. We ask

1 that you be no further than 15 minutes away from the
2 courthouse in case the jurors have a question, or they reach
3 a verdict. Will that be a problem for either side?

4 MR. GORDON: No, your Honor.

5 THE COURT: All we need is one representative. We
6 don't need to have everybody present.

7 The other thing is, please leave with
8 Ms. Cuaresma cell phone numbers. That will make it easier
9 to get a hold of you mean.

10 Two, I don't know if you have already done this
11 or not, but I need to review the exhibits to make sure we
12 all agree. If there is any disagreement I want to be able
13 to deal with it before they go to the jury tomorrow morning.

14 MR. PFAU: Your Honor, do you want us to do that
15 tonight or tomorrow morning?

16 THE CLERK: Let's do it now.

17 THE COURT: We will be in recess.

18 (Adjourned.)
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CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning